

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY HURTADO,

Defendant and Appellant.

B228634

(Los Angeles County
Super. Ct. No. VA107121)

APPEAL from a judgment of the Superior Court of Los Angeles County. Philip H. Hickok, Judge. Affirmed.

Koryn & Koryn and Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Anthony Hurtado of four counts of committing a lewd or lascivious act on a child under age 14. On appeal, defendant contends: (1) insufficient evidence supported the jury's verdict; and (2) the trial court erred in failing to instruct the jury on a lesser included offense of battery. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

At the 2010 trial, defendant's nine-year-old son, A.H., testified that in 2008 his parents shared equal custody of him. Half of the time A.H. lived with defendant at A.H.'s grandmother's house. He testified that defendant touched his penis (his "private") "like five" times while the two were on the couch at night. Defendant "wiggle[d] [A.H.'s] private around," underneath his clothing. On cross-examination, A.H. reported defendant was awake when he touched A.H., although defendant did not say anything. A.H. said he was "mostly asleep" when it happened, but he knew defendant was awake because "sometimes when I sleep my eyes are open and I feel stuff." A.H. testified defendant's eyes were open during the incidents. The touching would last "about like a minute or two" and defendant only used one hand; defendant's other hand did nothing. According to A.H., he bathed himself at the time; he did not recall previously testifying that defendant bathed him, including his private parts.

N.E., defendant's seven-year-old nephew, also testified. N.E. testified that he remembered previously talking to police about something that happened in a van. He did not remember what happened in the van. On cross-examination, N.E. testified that in August 2008, he was in a van with defendant, his mother, his cousin A.H., and other family members, riding home from an aunt's house. He recalled telling a police officer that defendant had touched his "private part," and he testified it happened in the van. N.E. said defendant was asleep when the touching happened, although he could not say how he knew defendant was asleep. Defendant was in between N.E. and A.H. in the back of the van. N.E. testified defendant woke up when N.E.'s mother, defendant's sister, hit him.

N.E.'s mother, P.H., also testified. In the early morning hours of August 24, 2008, she and other family members were driving home from a family party. Defendant was lying in the back of the van, between N.E. and A.H. P.H. testified she looked to the back of the van and saw defendant's hand on or near N.E.'s "private." P.H. asked, "what are you doing?" Defendant responded that he " 'thought it was [A.H.]' " ¹ He then accused P.H. of using drugs. On cross-examination, P.H. said defendant drank alcohol at the party. She testified defendant was probably dozing off in the back of the van because he had been drinking heavily, and he may have been asleep. When she saw defendant's hand on N.E.'s private part, she did not think defendant was asleep, but she believed he was probably dozing off.

Los Angeles County Sheriff's Department Detective Anthony Olague investigated the case. According to Olague, during a post-arrest interview, defendant admitted touching A.H.'s penis in a non-accidental sexual manner five times. Defendant said he had a lot of stress in his life. He also said he was sorry for what A.H. would have to go through for the rest of his life. On cross-examination, Olague recalled that defendant told him he had two beers and four "Jack and cokes" at the party that night. Defendant never said he molested his son. Defendant said he was sorry, but did not say he was sorry he was guilty of something bad. Deputy Sergeant John Gill also participated in the interview. Gill testified that defendant initially denied touching A.H. in a sexual manner. Gill specifically asked defendant about inappropriate touching, namely touching A.H.'s bare penis. Defendant said he touched A.H. no more than five times.

Defense Evidence

Defendant testified on his own behalf. In August 2008, defendant had joint custody of A.H. Defendant was living at his mother's house. He slept in the living room along with A.H., a nephew, and his step-father's brother. On August 24, 2008, defendant

¹ The parties stipulated that P.H. told a police officer that when she confronted defendant, he replied: " 'Dude, I thought it was [A.H.] . . . I was just showing him how to clean his private parts' . . ." At trial, P.H. testified she did not recall defendant making that statement.

was at a family party and drank “a couple beers and like six Jack and cokes.” He and other family members went home in a van. Defendant slept in the back of the van between A.H. and his nephew N.E. He awoke to his sister yelling. He recalled his sister yelled, “What are you doing?” He responded, “What are you talking about?” His sister said, “I saw you.” Defendant was drunk and was “trying to make sense of it.” He answered, “I thought it was [A.H.]; I was showing him how to bathe himself.” During the subsequent interview with police he was confused, his mind was racing, and he was “trying to make sense of everything.” He was upset, crying, and angry during the interview. At trial, defendant denied ever molesting N.E. or touching A.H. in a sexually inappropriate way.

On cross-examination, defendant testified that in the past he had made sexual advances toward male friends, and A.H.’s mother, while he was sleeping. He agreed it was possible he had his hands on N.E.’s genitals while in the van. He maintained he had no recollection of ever touching A.H.

Two of defendant’s friends testified. Victor Garnica had known defendant since high school. He recalled that once, when he and defendant were 16 or 17 years old, there was a party at Garnica’s house that involved a lot of drinking. Garnica and defendant fell asleep in the same bed. In the middle of the night, Garnica woke up when defendant reached over and grabbed Garnica’s chest. When Garnica asked defendant what he was doing, defendant was startled. Garnica could tell defendant was not completely awake. Gregg Myers had also known defendant since high school. He remembered that once, when they were still in school, they had been partying and drinking alcohol. Defendant went to bed, and Myers later went to “crash” in defendant’s bed. Defendant reached over to Myers as “if he was making advancements to” Myers. Myers saw that defendant was asleep. Myers pushed defendant away, but believed defendant would have touched his genital area had Myers allowed it.

Defendant also offered the expert testimony of Dr. Abraham Argun, a specialist in clinical forensic psychology. Argun testified that “sexsomnia” is a subset of parasomnia, a condition in which the brain is in a dual state. In this state a person may be awake

enough to rise from bed, prepare and eat a meal, and return to bed, all without remembering the next day. Stress and alcohol can be triggers for sexsomnia. Argun explained that clinical research indicates that during sexsomnia episodes, the conscious part of the brain “is not awake . . . [b]ut the subconscious mind has become active.” Argun opined defendant suffered from sexsomnia and was not malingering. Argun also opined defendant suffered from bipolar disorder.

On cross-examination, Argun testified that the research on sexsomnia indicates the disorder is more likely to occur in people who have a history of sleepwalking. As far as Argun knew, defendant had no history of sleepwalking. Argun further testified that characteristics of bipolar disorder—also known as manic depression—included poor judgment, impulsiveness, lack of insight, self-importance, grandiosity, loss of touch with reality, and risky behavior. Argun agreed he observed evidence of these traits in defendant.

Verdict and Sentence

The jury deliberated for less than 45 minutes before returning guilty verdicts. The jury found defendant guilty of three counts of a lewd or lascivious act upon a child as to A.H., and one count as to N.E. (Pen. Code, § 288, subd. (a).)² As to the count concerning N.E., the jury found true an allegation that the offense was committed on multiple victims within the meaning of section 667.61, subdivision (b).³ The trial court sentenced defendant to a total prison term of 15 years to life. Defendant timely appealed.

² All further statutory references are to the Penal Code.

³ Under section 667.61, subdivisions (b), (c)(8), and (e)(4), if a defendant is convicted in “the present case or cases” of committing a lewd or lascivious act in violation of section 288, subdivision (a) against more than one victim, the defendant shall be punished by imprisonment in state prison for 15 years to life.

DISCUSSION

I. Substantial Evidence Supported the Jury's Verdict

Defendant contends insufficient evidence supported the jury's findings. He argues there was no evidence to establish he acted with the requisite specific intent under section 288, subdivision (a). We disagree.

When reviewing a claim of insufficient evidence, we determine “ ‘ “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citations.] We examine the record to determine “whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.] Further, “the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citation.] This standard applies whether direct or circumstantial evidence is involved. “Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ‘ “If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” ’ ” [Citation.]’ [Citation.]” (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.)

Section 288, subdivision (a) sets forth criminal punishment for “any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child” The statute thus prohibits sexually motivated contact with a child under 14.

“To determine whether a defendant acted with sexual intent, all the circumstances are examined. Relevant factors include the nature and manner of the touching, the defendant’s extrajudicial statements, the relationship of the parties and ‘any coercion, bribery or deceit used to obtain the victim’s cooperation or avoid detection.’ ([*People v. Martinez* (1995) 11 Cal.4th 434, 445 (*Martinez*)].) The requisite intent ‘must be inferred from all the circumstances A touching which might appear sexual in context because of the identity of the perpetrator, the nature of the touching, or the absence of an innocent explanation, is more likely to produce a finding that the act was indeed committed for a sexual purpose and constituted a violation of the statute. . . .’ [Citation.]” (*In re R.C.* (2011) 196 Cal.App.4th 741, 750.)

Substantial circumstantial evidence established defendant acted with unlawful sexual intent. Defendant touched A.H.’s penis on five occasions while the two were on a couch together at night. A.H. testified defendant wiggled his “private” back and forth, underneath his clothes. Defendant’s sister testified she saw defendant with his hand on N.E.’s “private” while in the back of a van. There was no evidence suggesting defendant had an innocent reason to touch his son’s or nephew’s genitals in the manner described at trial. Defendant also changed his story about what happened with A.H. and N.E. He first denied touching A.H., but then admitted to police officers he had touched A.H. inappropriately no more than five times. He responded to his sister’s outrage in the van with an explanation that he thought N.E. was A.H., and he was showing A.H. how to bathe himself. He then immediately and defensively accused P.H. of using drugs. (*In re Randy S.* (1999) 76 Cal.App.4th 400, 407 [finding substantial evidence of intent to sexually arouse in part because perpetrator repeatedly changed his story to avoid being caught].) Even at trial, defendant was equivocal in his testimony about whether he had touched A.H. and N.E. in the manner described. This evidence was sufficient for the jury to conclude defendant violated section 288, subdivision (a).

Defendant’s only argument is that he did not form the requisite intent because he was asleep when he touched A.H., and asleep and intoxicated when he touched N.E. However, the jury was free to reject defendant’s explanation and credit the contradictory

evidence. A.H. testified defendant was awake when he touched A.H. N.E.'s mother testified she did not think defendant was asleep when she saw him with his hand on or near N.E.'s genitals. Further, there was evidence that when N.E.'s mother confronted defendant, he responded, not only offering an explanation for what he was doing, but also managing to accuse P.H. of using drugs. Although defendant claimed he did not remember ever touching A.H. inappropriately, he told police the touching happened no more than five times, which was the same number of times A.H. said the touching occurred.

In addition, while defendant's expert witness opined defendant suffered from sexsomnia, the opinion was based on relatively little information, most of which came from defendant. The expert was not able to conduct an MRI or a sleep study; further he admitted that those who suffer from sexsomnia commonly have experienced sleepwalking episodes. There was no evidence defendant had ever sleepwalked. It was for the jury to decide whether it believed defendant was acting in a conscious or unconscious state when he committed the charged acts. The jury apparently determined defendant was conscious during these incidents, and that determination was supported by substantial evidence. Sufficient evidence supported the jury's conclusion that defendant acted with sexual intent and violated section 288, subdivision (a).

II. The Trial Court Did Not Err in Failing to Instruct the Jury on Battery as a Lesser Included Offense

Defendant argues the trial court should have sua sponte instructed the jury on battery as a lesser included offense. There is a split of authority on whether battery is a lesser included offense of lewd or lascivious acts on a child under age 14. (Compare *People v. Santos* (1990) 222 Cal.App.3d 723, 739 with *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1293.) As both parties noted, the issue is currently before the California Supreme Court. (*People v. Shockley* (2010) 190 Cal.App.4th 896, review granted Mar. 16, 2011, S189462.) We need not take a position on the issue. Even if battery is considered a lesser included offense of a section 288 violation, we would conclude the evidence did not support giving a lesser included instruction in this case.

Further, even if the instruction was warranted in this case, we would find any error harmless.

“[A] trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence. [Citation.] It is error for a trial court not to instruct on a lesser included offense when the evidence raises a question whether all of the elements of the charged offense were present, and the question is substantial enough to merit consideration by the jury. [Citation.] When there is no evidence the offense committed was less than that charged, the trial court is not required to instruct on the lesser included offense. . . . [¶] On appeal, we review independently whether the trial court erred in failing to instruct on a lesser included offense. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 181.) Lesser included offense instructions are “required only where there is ‘substantial evidence’ from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense. [Citations.]” (*People v. DePriest* (2007) 42 Cal.4th 1, 50.)

Defendant argues he was asleep, intoxicated, and suffering from sexsomnia during the charged incidents, thus there was evidence he did not have the specific sexual intent required for a conviction under section 288, but the jury could have found him guilty of battery. We disagree. To find defendant committed simple battery under section 242, the jury would have to have concluded defendant willfully touched the victims in a harmful or offensive manner. (*People v. Martinez* (1970) 3 Cal.App.3d 886, 889.) The term “willful” in this context means “on purpose.” (*People v. Lara* (1996) 44 Cal.App.4th 102, 107 [willful in the crime of battery means “ ‘simply a purpose or willingness to commit the act. . . .’ ”].)

There was no substantial evidence to support this theory. The evidence at trial supported only two scenarios. In the prosecution version of events, defendant, while conscious, touched A.H. and N.E. for sexually motivated reasons, and in a manner that was overtly sexual in that he touched and manipulated their sexual organs. The defense version was that defendant formed no intent whatsoever because he was asleep, or intoxicated and asleep, and he acted unconsciously. In defendant’s characterization of

the incidents he could not have committed battery because he was unconscious when he acted. (*People v. Rogers* (2006) 39 Cal.4th 826, 887 [unconsciousness is a complete defense unless it is voluntarily induced]; *People v. Heffington* (1973) 32 Cal.App.3d 1, 8.) No substantial evidence supported a third “battery” scenario, in which defendant acted while conscious and touched both victims, but with a nonsexual motivation. Indeed, given the nature of the alleged touching—direct sustained contact with the victims’ sexual organs for no apparent innocent reason—the jury had no basis to conclude defendant engaged in willful and offensive but nonsexual touching.

We recognize that as to the count involving N.E., there was evidence that defendant was voluntarily intoxicated. There was also evidence that, while in this drunken state, defendant touched N.E. and said he thought he was touching A.H., and he was showing A.H. how to clean himself. Although this ostensibly would support a theory that defendant did not form the specific sexual intent required under section 288, but he also engaged in willful offensive touching, we do not find this thin reed constituted substantial evidence that would have warranted a lesser included battery instruction. (*People v. Valdez* (2004) 32 Cal.4th 73, 116 [there must be evidence a reasonable jury could find persuasive to warrant instruction on lesser offense].) Moreover, even if the evidence warranted a trial court instruction on battery, we would find any error harmless.

The failure to instruct on a lesser included offense is only reversible error if it appears reasonably probable the defendant would have obtained a more favorable outcome had the instruction been given. (*People v. Breverman* (1998) 19 Cal.4th 142, 177-178.) *People v. Thomas, supra*, is instructive. In *Thomas*, the court concluded battery was a lesser included offense of lewd acts on a child. The evidence established the defendant touched one victim multiple times. The victim testified that on one occasion, the defendant got into bed with him and touched him under his boxer shorts. The defendant admitted he touched the victim’s buttocks, but contended he was only attempting to wake the victim and was not sexually aroused. He denied touching the victim underneath his boxer shorts. The *Thomas* court found the court’s failure to give a battery instruction was not prejudicial as to that count. In light of the evidence of the

defendant's other sexual offenses against the victim and other boys, the court determined it was not reasonably probable the jury would have accepted the defendant's account over the victim's to conclude the incident was merely offensive touching rather than a lewd act. (*People v. Thomas, supra*, at pp. 1293-1294.)

However, another count in the case was supported by the victim's testimony that the defendant entered a basement where the victim was playing a videogame. The defendant touched the victim on the shoulder, and the victim pulled away. As to this count, the court found the trial court's failure to instruct the jury as to battery was prejudicial. The court concluded: "Defendant's purpose in committing that particular touching was critical to determining his guilt under section 288. [Citation.] The trial court erred in not instructing on battery because a reasonable jury could have concluded that the touching was offensive to [the victim] in light of defendant's other conduct, but that it was not committed with intent to gratify defendant's sexual desires. In light of the objectively nonsexual nature of the act, it is reasonably probable that a jury would have convicted Thomas of battery on that count." (*People v. Thomas, supra*, at p. 1294.)

No objectively nonsexual acts were at issue in this case. A.H.'s testimony was that defendant not only touched him, but "wiggled" his "private part," and did so for "a minute or two." Further, the evidence was that defendant had his hand on N.E.'s genitals, and that he reacted defensively when questioned about his actions. It is not reasonably probable that the jury would have convicted defendant of battery but not lewd acts as to either A.H. or N.E. There was no evidence that defendant was intoxicated when he inappropriately touched A.H., which cast significant doubt on any argument that his touching of N.E. had a nonsexual motivation and was the result of his voluntary intoxication. Defendant's explanation that he, in his drunken state, thought N.E. was A.H. and he was demonstrating proper hygiene, was extremely incredible under the circumstances. Further, the defense expert's testimony regarding the symptoms of defendant's personality disorder did not suggest the disorder would cause defendant to unlawfully touch children for a nonsexual reason. And, as explained above, if the jury believed the sexsomnia defense, it could not have found him guilty of battery.

The speed with which the jury made its decision suggests it did not struggle in finding defendant not credible, or in concluding the prosecutor had proved the elements of the crimes as charged. (*People v. Robertson* (1982) 33 Cal.3d 21, 36 [short jury deliberations likely reflected the strength of the prosecution's case].) As noted above, in light of the overtly sexualized nature of the touching in this case, and the absence of any innocent explanation, it is not reasonably probable the jury would have concluded defendant engaged in offensive but nonsexual touching if the court had instructed on battery as a lesser included offense.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.